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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
Petitioner

v.

FRED P. GARDNER,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR RESPONDENT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 as part of the "War Risk Insurance Act" provides disability compensation to veterans injured as a result of medical treatment administered by Department of Veterans Affairs personnel. The 1924 Congress intended to provide a worker's compensation-type benefit to veterans, without requiring the veteran to prove that the medical injury was caused by any fault on the part of VA personnel. Two years thereafter, however, the VA embarked on a 60-year course of promulgating regulations which variously required veterans to present evidence of some form of fault in the rendering of medical treatment as a predicate to compensation. No fault requirement is contained in the statute. The question in this case is whether the Court of Veterans Appeals and the Court of Appeals for the Federal Circuit were correct in striking down the current regulation containing a fault requirement because it is inconsistent with the contrary intent of Congress contained in the straightforward no-fault language of the statute.

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STATEMENT OF THE CASE

Fred P. Gardner, a veteran of the Korean conflict era, underwent surgery at a VA medical facility in June 1986 to relieve radiating back pain due to a herniated disc in the lumbar spine. While the Secretary is correct to state that the surgery was "successful in removing the herniated disc" (Brief for the United States at 8) [hereinafter Brief], Mr. Gardner suffered a serious injury during his surgery resulting in permanent neurological damage. Mr. Gardner has experienced progressive nerve damage and muscular wasting in the left leg, and he is now completely disabled. Today Mr. Gardner wears a leg brace, uses a cane, requires a wheelchair for hospital visits, and is disabled from employment.

Over two years after the surgery, Mr. Gardner filed a claim with the Waco, Texas, VA regional office [VARO] for disability compensation benefits under 38 U.S.C. § 1151 (Supp. IV 1992), which provides in pertinent part:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of . . . medical or surgical treatment . . . and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to . . . the veteran, disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

There are two major disability benefit programs administered by the VA: service-connected disability compensation and non-service-connected disability pension. By operation of Section 1151, Mr. Gardner would have been eligible for service-connected disability compensation for this surgical injury in the form of a monthly payment, even though the surgical injury was not service-connected as incurred "in the line of duty." This is so because under Section 1151, benefits "shall be awarded in the same manner as if such disability . . . were service-connected."

Hence, these benefits are sometimes referred to as "quasi-service-connected benefits."

The rate of compensation—designed to offset the degree to which the disability impairs the ability to earn a living—is set by a schedule containing ten percentage grades of disability based on the seriousness of the injury, ranging from 0 percent to 100 percent. *See* 38 U.S.C. § 1155 (Supp. IV 1992).[1] For fiscal year 1991, the VA paid veterans and their dependents over $12.13 billion in compensation benefits and over $3.9 billion in pension benefits. Annual Report of the Secretary of Veteran Affairs, Fiscal Year 1991 at 115.

Mr. Gardner's claim was denied by the VARO in Waco, Texas. He then appealed *pro se* to the Board of Veterans' Appeals [BVA] in Washington, D.C., which also denied the claim. The regulation upon which the VARO and the BVA relied to deny benefits provides in pertinent part:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

[1] The establishment of service connection even at the 0 percent level may also entitle a veteran to ancillary benefits such as public employment preferences, job retention rights, and basic VA health care. *See, e.g.*, 38 C.F.R. §§ 17.30-17.612 (1990). If service connection is established at a 50% level, a veteran is entitled to medical treatment for all conditions. 38 U.S.C. § 1710(a)(1)(D) (Supp. IV 1992).

38 C.F.R. § 3.358(c)(3) (1990). Neither the VARO nor the BVA was free to decide the claim contrary to the terms of the existing regulation; they are prohibited from doing so by statute. 38 U.S.C. § 7104(c) (Supp. IV 1992); 38 C.F.R. § 3.101 (1990). Mr. Gardner then appealed to the U.S. Court of Veterans Appeals [COVA] which has exclusive jurisdiction over BVA decisions. 38 U.S.C. § 7261 (Supp. IV 1992).[2]

COVA reversed the BVA denial of benefits in a unanimous three-judge opinion authored by Chief Judge

[2] The Secretary, makes two contentions in his brief to this Court regarding Mr. Gardner's claim before COVA that require comment. First, the Secretary contends that Mr. Gardner while acting *pro se* did not himself raise the issue which has generated this petition: that is, whether the fault requirement contained at 38 C.F.R. § 3.358(c)(3) impermissibly conflicts with the statutory mandate of 38 U.S.C. § 1151. (Brief at 10 n.5). To the contrary, recognizing the plain language of the legislative grant at issue in this case, Mr. Gardner without aid of counsel wrote to the BVA demanding service-connected benefits under the plain language of 38 U.S.C. § 1151. (Claimant-Appellee Appeal from the United States Court of Appeals, Appendix at 131-132) [hereinafter C.A. App.]. COVA later ordered supplemental briefing on this issue as a result of its ongoing efforts to be solicitous of *pro se* veterans, who comprise over 70% of the Court's docket.

Second, the Secretary states that the BVA secondarily denied Mr. Gardner's claim on the grounds that his condition was "not in any way related to the [surgery]." (Brief at 9). The Secretary goes on to assert that the Court of Veterans Appeals and the Federal Circuit, in upholding Mr. Gardner's claim, disregarded that factual finding. The fact is that neither court has authority to review purely factual determinations of the BVA. *See* 38 U.S.C. § 7261 and 38 U.S.C. § 7292(d)(2)(A), (B) (Supp. IV 1992). More significantly, however, VA counsel expressly conceded in argument before COVA that Mr. Gardner is totally and permanently disabled and that such disability was caused by the surgery. In particular, in a supplemental memorandum to COVA, the Secretary stated that "there is no dispute that such condition was caused by the surgery." Memorandum of the Secretary at 14.

Nebeker. At that stage in the litigation—and contrary to his position in this Court—the Secretary agreed that the statute plainly did not include an element of fault in its literal terms. (Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit, Appendix at 25a) [hereinafter Pet. App.]. Instead, the Secretary argued that giving full play to a literal reading of the statute would lead to a "ludicrous result" demonstrably at odds with the intent of Congress. *Id.* In support of this view, the Secretary asserted that the words of the statute—"injury resulting in additional disability"—would require compensation for *any* change in the veteran's condition resulting from surgery, such as a surgical scar or the amputation of a gangrenous limb. The Secretary believed that the VA's engrafted fault requirement was necessary to preclude this allegedly absurd outcome resulting from a literal application of the statute.

In rejecting this argument, COVA concluded there was insufficient evidence of any Congressional intent to limit compensation to instances of VA fault, as the Secretary had accomplished by regulation. COVA observed that the statute includes only two limitations on the granting of benefits: first, that the injury occurs "as a result of" medical treatment; and, second, that the injury must not be a "result of such veteran's willful misconduct." (Pet. App. at 27a). Reasoning from the structure of the statute, COVA concluded that Congress had considered the issue of VA fault and intentionally excluded it as an element from the statute. COVA found that this conclusion was not contradicted by any of the legislative history. In fact, the legislative history surrounding the 1924 enactment was as compatible with a no-fault system as with a fault system. (Pet. App. at 29a). Finally, COVA rejected the Secretary's plea for deference to his interpretation of the statute, since the statute was plain on its face. *Id.*

On appeal to the Court of Appeals for the Federal Circuit, another unanimous panel affirmed the invalidity of the Secretary's fault-based regulation in the face of yet a new argument by the Secretary in that court. There the Secretary argued for the first time that Section 1151 was ambiguous, in an effort to invoke the deferential standard afforded an agency's interpretation of an ambiguous statute required by this Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Secretary suggested that the words "as a result of" were unclear and justified the adoption of the VA regulation requiring proof of fault as a predicate to compensation. However, neither the Secretary nor his predecessor had ever in the 68-year history of the statute taken the position that the statute is ambiguous. On the contrary, VA General Counsel have repeatedly observed that the statute is quite clear, as we discuss below.

The Federal Circuit concluded that the language "as a result of" was not ambiguous and "mandates only a causation requirement" (Pet. App. at 7a), and affirmed the invalidity of the Secretary's fault-based regulation. The Federal Circuit recognized that fault and causation are fundamentally distinct concepts which Congress has routinely distinguished in other legislation. When read in its entirety, the statute makes clear that the preclusion of a fault element by Congress was both informed and intentional. (Pet. App. at 8a).

The Federal Circuit similarly found from a review of the legislative history that "Congress's paramount concern was to compensate veterans injured by VA medical treatment." (Pet. App. at 17a). The court found no indication that Congress intended to place upon the veteran the "complex burden of proving negligence" as a condition of compensation. *Id.* Regarding the Secretary's request for deference to his regulatory interpretation, the Federal Circuit concluded that Congress had left no

gap in the statutory mandate that would permit the exercise of discretion by the Secretary to impose a fault requirement in the compensation process. The court need not defer to the Secretary's asserted "long-standing" interpretation of the statute because that interpretation was not contemporaneous with the statute's enactment. Finally, the court observed that VA regulations should be subjected to "vigorous review" because such regulations were never subject to judicial scrutiny until the creation of the Court of Veterans Appeals in 1988:

> Until 1988 . . . the VA stood "in 'splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review. . . .'" Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them.

(Pet. App. at 20a) (citation omitted).

SUMMARY OF THE ARGUMENT

Section 1151 provides that a veteran injured as a result of VA medical treatment is entitled to compensation for that injury without having to prove fault of any kind. The language of the statute is plain and unambiguous, and a no-fault reading of the statute is consistent with the statutory provision as a whole and the overall statutory scheme of veterans benefits as enacted in 1924. Incorporating a fault element into that statute by regulation is contrary to the clearly stated intent of Congress in 1924. There is no justification for any reference to subsequent legislative history or to an asserted "long-standing" agency interpretation of Section 1151 based on contrived arguments by the Secretary that the statute is ambiguous. This is particularly true where the benefits of that statute must be liberally construed by the VA

in favor of the veteran and where the legislative history is consistent with the plain meaning found by the courts below.

The VA interpretation of Section 1151 is an unreasonable expression of the dictates of Congress and is entitled to no deference. The VA's own General Counsel in interpretative opinions on at least two occasions has acknowledged that the legislative history of Section 1151 affords little support for the VA regulation. Similarly, the General Counsel has repeatedly changed the fault-based regulation in substantive ways that are at odds with the VA's assertion that the regulation represents a consistent and "long-standing" interpretation of Section 1151. The General Counsel also has conceded in interpretive opinions that the history of the VA regulation of Section 1151 is a confusing maze of ambiguity and conflict which would not support a claim for judicial deference.

There is no reason for this Court to allow special deference to VA regulations. Until 1972, none of the VA's fault-based regulations pertaining to Section 1151 were the product of notice and comment rulemaking. Until 1988, none of the VA's regulations were reviewable by a court. Until 1989, none of the VA General Counsel's opinions interpreting Section 1151 and the VA regulations were published in the Federal Register. Indeed, none of the VA decisions applying this regulation in the past have ever been generally available to the public. In short, VA regulations and General Counsel opinions for over 64 years have constituted a secret body of law. The courts having exclusive jurisdiction over decisions of the Board of Veterans' Appeals, therefore, should employ a vigorous review of agency regulations because Congress has narrowly circumscribed the authority of the Secretary to promulgate only regulations that are "consistent with [the] laws." In any event, no standard of judicial deference to VA regulations would warrant reversal of the judgment of the Court of Appeals.

ARGUMENT

I. THE PLAIN MEANING OF SECTION 1151 PRECLUDES IMPOSITION OF A FAULT REQUIREMENT AS A PREDICATE FOR BENEFITS.

The Secretary argues that enactment of the VA's fault-based regulation involves a routine application of the tools of statutory construction because the statute is ambiguous. (Brief at 12). To reach that result the Secretary argues that the words "injury" and "as a result of" as used in the statute are ambiguous and require the fault-based regulation. The VA, however, has never asserted these arguments as support for the regulation in the 66 years that preceded this litigation. The Secretary is seeking deference to an interpretation which is actually a "post hoc rationalization of government lawyers" or an "inference[] derived from reading between the lines of an agency decision or excerpted from the brief of a government lawyer." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. ——, 112 S.Ct. 1394, 1405 (1992) (White, J., dissenting); *Motor Vehicle Mfrs. Assoc. of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983).[3] The VA has

[3] The Secretary implicitly suggests that this change in strategy was the product of the lack of "opportunity to develop a record at the administrative level on the issue now before the Court" rather than a late effort to obtain *Chevron*-type deference to the regulation. (Brief at 25 n.14). To that end, the Secretary has supplied the Court with certain VA General Counsel opinions and has advised that other opinions are "available through the VA law library." (Brief at 24 n.14). First, in BVA proceedings no such "administrative record" could have been made since a veteran may not challenge the validity of a VA regulation. 38 U.S.C. § 7104(c). Second, at COVA the Secretary did not present these authorities because his argument there was that the statute was plain on its face, but that literal application would lead to absurd results.

The general unavailability of these VA source materials, exhibited by the Secretary's own brief, explains why no deference is owed to the VA regulation based on these materials. In fact,

promulgated its fault-based regulations over the years not because the statute is ambiguous, but rather because the VA has chosen to respond to competing interests on an *ad hoc* yet inconsistent basis.[4]

A. The Language of the Statute

Far from being a "routine sort of statutory interpretation," the Secretary's regulation is directly contrary to an unambiguous statutory mandate that "would [not] warrant a different construction" or justify deference to an ill-conceived formulation of misguided agency policy. *National Organization for Women, Inc. v. Scheidler*, —— U.S. ——, 114 S.Ct. 798, 806 (1994). In Section 1151 Congress has stated that benefits "shall be awarded" where a veteran has suffered "an injury . . . as a result of medical or surgical treatment." Hence, as in *Conroy v. Aniskoff*, 507 U.S. ——, 113 S.Ct. 1562, 1564 (1993), "[t]he statutory command . . . is unambiguous, unequivocal, and unlimited" and thus not subject to contravention by the VA.[5] This analysis begins, as always,

the VA cannot locate some of the original source materials upon which the Secretary now relies. *See* note 9, *infra*.

[4] The VA's actions must be upheld, if at all, only on the basis articulated by the agency itself and not by its counsel in litigation. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

[5] *Conroy v. Aniskoff* involved the question of whether an Army officer was required to demonstrate prejudice to enjoy the benefits of certain tolling provisions, under the Soldiers and Sailors' Civil Relief Act, against the time in which to redeem real property sold for taxes. In that case, the Solicitor General appeared as *Amicus Curiae* and argued that the unambiguous statutory text rendered legislative history irrelevant. The Solicitor also argued that where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" Brief for the United States as *Amicus Curiae* at 6, 9-10, 21-22, *Conroy v. Aniskoff*, 507 U.S. ——, 113 S.Ct. 1562 (1993) (citations omitted). In that case, the Solicitor was correct to note that federal statutes granting benefits to veterans must be liberally construed pursuant

with the language of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. ——, 112 S.Ct. 2589, 2594 (1992), and the assumption that Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. ——, 112 S.Ct. 1146, 1149 (1992).[9]

Ignoring the plain meaning of the statute entirely, the Secretary has focused on the words "injury" and "as a result of" to promote an argument that the statute is ambiguous. The Secretary's convoluted argument on these points, however, "has exceeded the scope of available ambiguity." *John Hancock Life Ins. v. Harris Bank*, 510 U.S. ——, 114 S.Ct. 517, 531 (1993). The Secretary's argument also ignores the rule of statutory construction that words are to be given their ordinary, common sense, and natural meaning. *FDIC v. Meyer*,

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to *King v. St. Vincent's Hospital*, 502 U.S. ——, 112 S.Ct. 570, 574 n.9 (1991).

[9] *See also Central Bank v. First Interstate Bank*, —— U.S. ——, 114 S.Ct. 1439 (1994) (private plaintiff may not maintain aiding and abetting suit under Securities and Exchange Act); *FDIC v. Meyer*, 510 U.S. ——, 114 S.Ct. 996 (1994) (no implied cause of action for savings and loan officer under the Fifth Amendment); *City of Chicago v. Environmental Defense Fund*, —— U.S. ——, 114 S.Ct. 1588, 1591 (1994) (statute does not contain exclusion sought by agency); *Fogerty v. Fantasy, Inc.*, 510 U.S. ——, 114 S.Ct. 1023 (1994) (attorneys fees available to prevailing party in copyright infringement action); *Keene Corp. v. United States*, 508 U.S. ——, 113 S.Ct. 2035 (1993) (Court will refrain from reading into a statute what Congress has left out); *Mertens v. Hewitt Associates*, 508 U.S. ——, 113 S.Ct. 2063 (1993) (non-fiduciaries not covered by ERISA); *Dept. of Treasury v. Fabe*, 508 U.S. ——, 113 S.Ct. 2202 (1993) (on remand) (state statute regarding priority of creditors not preempted); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (witness attendance fee payable to prisoner); *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (OMB may not countermand agency regulations under Paperwork Reduction Act); *Lowe v. SEC*, 472 U.S. 181, 206 (1985) (publisher of securities newsletter not an investment advisor under Act of 1940).

114 S.Ct. at 100; *Dole v. United Sheetworkers*, 494 U.S. at 35-36; *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985). The Secretary concedes that "injury" in its ordinary sense means "any 'hurt, damage or loss sustained.'" (Brief at 13). There is nothing about that definition which requires the Secretary to include a fault element in Section 1151 adjudications.

The simple and straightforward language of the statute is reinforced by the overall structure of the statutory scheme of veterans benefits. *See John Hancock Life Ins. v. Harris Bank*, 114 S.Ct. at 523; *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 403-05 (1988). The structure of the statute itself presumes a no-fault basis in that compensation "shall be paid" for injury suffered "as a result of" four different circumstances: (1) hospitalization; (2) medical or surgical treatment; (3) the pursuit of a course of vocational rehabilitation; or (4) the conduct of a medical examination required by any provisions of Title 38. There are only two limitations to the mandatory grant of service-connected benefits under the statute, both of which deal only with causation. First, the injury or aggravation of an injury must occur "as a result of" one of the four circumstances enumerated. Second, benefits are not available to a veteran where the cause of the injury is "the result of such veteran's own willful misconduct." While a multiplicity of additional factors—including fault on the part of VA personnel or "accident" however defined—might be expected to operate in any of the four circumstances, none are mentioned in the statute as grounds for limiting the obligation of the Secretary to treat such injuries as service-connected. Nor is there an explicit or implicit grant of discretion to the Secretary to withhold service-connected benefits where the terms of the statute are met.

The courts below agreed that the omission of an element of fault in the statute was no oversight. The 1924 precursor of Section 1151, Section 213 of the World

War Veterans' Act, Pub. L. No. 68-242, 43 Stat. 607 (1924), was presented as a bill to amend the "War Risk Insurance" Act. *Hearings Before the House Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) [hereinafter 1924 Hearings]. Section 213 was clearly characterized at its inception as remedial legislation. *See* S. Rep. No. 397, 68th Cong., 1st Sess. 5 (1924). That the statute was part of an insurance program fortifies the observation of both courts below that Congress designed a no-fault scheme "given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability." (Pet. App. at 8a, 26a).

That Congress considered and rejected the concept of fault on the part of VA medical personnel is clear from the single exclusion of compensation benefits where the veteran is guilty of "willful misconduct." This demonstrates that the veteran is protected against even his own negligence, even though contributory negligence was a standard defense in fault-based systems in 1924. This no-fault approach is also consistent with both state and federal worker's compensation schemes. *See* 1A Larson, The Law of Workmen's Compensation § 2, at 1-5 (1952); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 904(b) (1986). Congress did not overlook a requirement of fault on the part of the VA where it carefully crafted such a modest exclusion to compensation based on the willful misconduct of the veteran. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The Contextual Use of "Injury" and "As a Result of" In the Statute

The accepted meanings of the words "injury" and "as a result of," as these words are used in other statutory provisions of the VA scheme, are at odds with the Secretary's current gloss. For example, in General Counsel Precedent Opinion 86-90, which is binding within the VA system [38 C.F.R. § 14.507 (1990)], the General Counsel stated that the word "injury" as used in 38 U.S.C. § 101(24) of the Act was "to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him," citing *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1944). In that context the General Counsel, therefore, concluded that "injury" meant "harm resulting from some type of external trauma." VA Gen. Coun. Prec. Op. 86-90 at 10 (1990). The same analysis should be relied on here for interpretation of the word "injury" in Section 1151.

While the word "injury" is not defined by Congress anywhere in the VA statutory compensation scheme, the word is nevertheless used elsewhere in the statute in its common sense meaning to define other terms. The most telling use of the word "injury" by Congress occurs in the original Act of 1924 to define compensable disabilities as "wound[s]," "*injury*," and "disease." Pub. L. No. 68-242, § 202(9), (10), 43 Stat. 607, 620 (1924) (emphasis supplied); *see generally* S. Rep. No. 397, 68th Cong., 1st Sess. 3 (1924). The corresponding statute today now authorizes the VA to provide compensation for "any disability," 38 U.S.C. § 1710(a)(1)(B) through (F), (H) and (I) (Supp. IV 1992), which it defines as "a disease, *injury*, or other physical or mental defect." 38 U.S.C. § 1701(1) (Supp. IV 1992) (emphasis supplied). *See Kirkhuff v. Nimmo*, 683 F.2d 544, 548 (D.C. Cir. 1982). The word "injury" in its common sense meaning also serves the intent of Congress elsewhere in

the statute where it is used to define the term "aggravation": "A preexisting *injury* or disease will be considered to have been aggravated . . . where there is an increase in disability . . . ." 38 U.S.C. § 1153 (Supp. IV 1992) (emphasis supplied). Incorporating a fault element to the meaning of the word "injury" in light of its use throughout Title 38 would negate the entire purpose of the Act. The "normal rule" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

The parallel statutory provisions of Sections 1110 and 1131—governing entitlement to disability compensation for conditions arising out of wartime and peacetime service—use language nearly identical to Section 1151 yet do not require the veteran to prove fault on the part of the service department. Compensation entitlement is established under those sections as long as there is a simple temporal relationship between the incurrence of the disability and a period of active service. 38 U.S.C. § 105 (Supp. IV 1992). In this regard, Section 1110 provides a guarantee of compensation to active military personnel for "disability *resulting* from personal *injury* suffered or disease contracted in line of duty . . . during a period of war." 38 U.S.C. § 1110 (Supp. IV 1992) (emphasis supplied). Similarly, Section 1131 provides a guarantee of compensation for active military personnel for "disability *resulting* from personal *injury* suffered . . . during other than a period of war." 38 U.S.C. § 1131 (Supp. IV 1992) (emphasis supplied). Both Section 1110 and Section 1131 contain the assertedly ambiguous words "injury" and "resulting" which, according to the Secretary, offend the plain meaning of Section 1151. Yet under these statutes, a veteran who suffers a surgical injury for treatment of a service-connected condition receives compensation without proof of fault, as the Secretary concedes. (Brief at 8, n.3). *See* 38 C.F.R. § 3.310(a) (1990).

The outcome of the interplay of the Secretary's regulations—imposing a fault requirement on Mr. Gardner but not on those who receive treatment for service-connected injuries—is that a veteran who incurs a disability caused by medical treatment cannot obtain compensation unless the original disability for which care was sought is service-connected. In other words, a veteran identically situated —but for the fact that the disability for which he seeks treatment is not service-connected—may not receive service-connected compensation for the new disability caused by medical treatment, unless the veteran meets the complex burden of proving that some form of fault on the part of the VA caused the new disability.

Because it is rational and proper to treat these two cases alike, there is no reason to assume that Congress did not intend for both veterans to be compensated for the "bad result" of their medical care on a no-fault basis. That was the primary focus of Congress according to the courts below (Pet. App. at 26a), and such an intent on the part of Congress was certainly not "impossible" or clearly absurd. Nor is there any evidence of a contrary legislative intent to treat these classes differently. In his petition to this Court, the Secretary never addressed the absence of any evidence that Congress intended to treat the hospitalized veteran and the active duty person differently under identical circumstances. In his brief, however, the Secretary suggests that this distinction between the service-connected and non-service-connected origin of the condition which leads to hospital treatment is at the heart of the statute and requires a fault-based regulation in the case of veterans who seek medical treatment for non-service-connected disabilities. (Brief at 8, n.3 and 15, n.8). However, there is no authority—nor does the Secretary refer to any—which supports even an inference that Congress had this distinction in mind in 1924 or at any time in reenacting Section 1151 benefits in 1934.

On the contrary, in General Counsel Precedent Opinion 80-90 (1990), the Secretary's own General Counsel stated that Congress *did not* intend there to be a dis-

tinction between recipients of so-called "quasi-service-connected" benefits under Section 1151 and recipients of benefits under Sections 1110 and 1131. "If Congress had intended to preclude such payment, it would have expressed recognition of the inconsistency by specifically excluding such class of claimants." (Joint Appendix at 27) [hereinafter J.A.]. Section 1151 unambiguously provides that, should its predicate conditions be met, disability compensation "shall be awarded *in the same manner* as if such disability . . . were service-connected." 38 U.S.C. § 1151 (emphasis added). The Secretary may not change this outcome by regulation. *See Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463 (1989).

C. The Overall No-Fault Scheme of VA Benefits Legislation

The fault requirement of the regulation is inconsistent with the entire policy of VA compensation shown in the enactments of Congress and recognized by decisions of COVA. The veteran is entitled to the benefit of the doubt in all proceedings. 38 U.S.C. § 5107(b) (Supp. IV 1992); 38 C.F.R. § 3.102 (1990); *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990). The VA is required to apply a broad and liberal interpretation of its rules. 38 C.F.R. § 3.303(a) (1990). The VA has a duty to assist the veteran in the investigation and presentation of his case before the VARO and the BVA. 38 U.S.C. § 5107(a) (Supp. IV 1992); *Murphy v. Derwinski*, 1 Vet. App. 78 (1990). Independent expert medical opinions are available to the veteran in some cases in order to support a claim involving complex medical issues. 38 U.S.C. § 5109 (Supp. IV 1992). Congress has also concluded that for certain medical conditions, the veteran is entitled to a presumption of service-connectedness in evaluating entitlement to compensation. 38 U.S.C. §§ 1112, 1116 (Supp. IV 1992). Imposing the complex burden of proving malpractice as a predicate for compensation is at odds with the entire VA system of benefits.

Consistent with this policy, this Court rejected a constitutional challenge to the then-existing $10 congressional limitation on attorneys fees for representation of veterans in the claims process. In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), the VA argued in favor of the $10 limit based on the premise that Congress intended the benefit system to be non-adversarial, informal, and paternalistic. This Court described the benefits system as one in which lawyers were unnecessary because applying for benefits is a "relatively uncomplicated procedure." *Id.* at 330 (quoting S. Rep. No. 446, 97th Cong., 2d Sess. 25, 49-50 (1982)). Because the principal issues in the VA benefits system are primarily (1) the extent of disability, and (2) the disability's causal connection to service, this Court concluded that there is a low probability of error in the benefits process. *Id.* at 310, 326. Therefore, this Court concluded that to the extent the $10 cap on attorney's fees discouraged legal representation of veterans, that circumstance did not adversely affect the accuracy of the claims procedure. Particularly relevant to the issues in this case, this Court observed:

> [The] process is designed to function throughout with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect. . . . VA boards are instructed to read any submission in the light most favorable to the claimant.
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> *Simple* factual questions are capable of resolution in a *nonadversarial* context, and it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgments.

Id. at 311-12, 330 (citing 38 C.F.R. §§ 19.129, 19.124, 19.121 (1984)) (emphasis supplied). Finally, "the panel [that determines disability levels] is required by regulation 'to assist a claimant in developing the facts pertinent to

his claim.'" *Id.* at 310 (citing 38 C.F.R. § 3.103(a) (1984)). *See also* 38 U.S.C. § 5107(a). Such a duty is incompatible with a fault based system; indeed if fault were required under Section 1151, the VA would be obligated to help claimants establish the negligence of its own doctors and nurses.

The *Walters* decision makes clear that the Secretary's argument regarding the meaning of "injury" and "as a result of" is entirely inappropriate. The Secretary, in his brief at 15 n.8 and 17, attempts to incorporate into each of these terms a so-called "legal" definition to support the fault-based regulation. Such a component, with the concomitant complexities of tort law, would mandate legal representation throughout the claims process in contrast with *Walters*. Yet even with the enactment of the Veterans Judicial Review Act [VJRA] in 1988, Congress preserved the nonadversarial system, even though the attorney fee cap was eliminated. Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988), codified at 38 U.S.C. § 7251 *et seq.* (Supp. IV 1992). Under the VJRA, attorney's fees may only be awarded for representation of a veteran *after* the first final decision of the BVA. 38 U.S.C. § 5904(c)(1) (Supp. IV 1992). This provision ordinarily means that representation of the veteran would occur only before COVA, where the VA maintains that the relationship between the Secretary and the veteran becomes, for the first time, strictly adversarial. In the VJRA, Congress clearly intended that even this new system for attorney's fees should permit continuation of the prior practice of veterans being assisted by skilled veterans' service officers throughout the VA regional offices and through the initial BVA administrative process. *See* 134 Cong. Rec. S16,646 (1988) (statement of Sen. Cranston). "In providing for judicial review of veterans claims, it is not our intent to encourage litigation between veterans and the VA." 134 Cong. Rec. H10,343 (1988) (statement of Rep. Montgomery).

In this context, the Secretary opines that had Congress intended a no-fault system in 1924, there would have been legislative comment on the elimination of the fault requirement from common law concepts of negligence. The error in this analysis is that in 1924, the common law of sovereign immunity meant that *no one* could sue the government for malpractice. The Federal Tort Claims Act was not enacted until 1946. 28 U.S.C. §§ 1346(b), and 2671 *et seq.* (1982). Furthermore, Congress in 1924 could not have created only a malpractice-type system for veterans *sub silentio* where the enactment of the Federal Employees Liability Act in 1908 demonstrates that Congress knew expressly how to enact fault when it wanted to do so. *See* Federal Employers' Liability Act, 45 U.S.C. § 51 (1988). The FTCA, in contrast to Section 1151, focuses on fault and its procedures reflect this. For example, 28 U.S.C. § 2401(b) provides a two-year statute of limitations for FTCA claims. Such provisions, which relieve defendants of the burden of disproving fault once memories and evidence are lost, are common to fault-based systems. By contrast, Congress repealed Section 1151's two-year statute of limitations in 1962, because it had "resulted in some inequities"—that is, deprived some veterans injured in VA hospitals of disability payments. S. Rep. No. 2042, 87th Cong., 2d Sess., *reprinted in* 1962 U.S.C.C.A.N. 3260, 3268. Thus, the veterans' disability system rejects that the FTCA embraces: the procedural features of a fault-based system.

The absence of a fault requirement is not an anomaly, but an essential part of a benefits system of which Section 1151 is an integral part. In 1924, it would have been unreasonable for Congress to believe that a veteran—physically and sometimes mentally disabled—could establish fault where he was forbidden to pay an attorney more than $10 and was required to rely on the VA itself for his evidence of fault. This is the real background against which Congress created the World War Veterans Act.

Prior to 1924, a veteran treated for a service-connected disability could obtain benefits for any surgical injury that resulted, without proof of fault. With the 1924 Act, Congress simply put the veteran treated for a non-service-connected disability on a par with the veteran treated for a service-connected disability. Rather than incorporating a fault-based system, Congress simply expanded a no-fault compensation system. Because Congress simply expanded the VA's prior compensation scheme, it is hardly surprising that there was no mention made of any radical change in the common law, since no such radical change was intended.

D. The Legislative History of the Act

As both courts noted below, recourse to legislative history is not appropriate in light of the plain meaning of the statutory text, *Darby v. Cicneros*, 509 U.S. ——, 113 S.Ct. 2539, 2545 (1993). However, the pre-enactment legislative history of the 1924 Act actually supports the no-fault compensation scheme.[7] General Frank T. Hines, in recommending the legislation, stated:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of accident or negligence of treatment or unskillfulness—*things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit, has, in fact, inflicted a loss.

1924 Hearings at 113 (emphasis supplied). In the following colloquy with members of Congress, General Hines stated:

[7] The Secretary grudgingly concedes that "it is difficult to draw any confident conclusion about the intended scope of Section 213 on the basis of the pre-enactment legislative history alone." (Brief at 26). Hence, the Secretary abandons any argument that the legislative history of the original enactment supports the fault-based regulation.

> [I]t seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect* . . . [w]ith the best medical advice, and still at the end of a certain period we find the man has a greater disability than he originally started with, and we have no way of correcting in any measure that condition.

1924 Hearings at 114 (emphasis supplied). Lest there were any doubt of the intention of General Hines as sponsor of this legislation on behalf of the Veterans' Bureau, the record in the House contains a letter from General Hines in which he wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the workmen's compensation act. I would extend the principle beyond this particular proposal to include also ratable disability *incurred without fault and due to the hazards of medical and surgical treatment.*

1924 Hearings at 122 (emphasis supplied).

The only countervailing legislative history upon which the Secretary has relied consists of comments, also made by General Hines, which make clear that the legislation would also provide compensation in the case of VA fault. (Brief at 23-24). Those comments, however, are entirely consistent with a no-fault compensation scheme, since benefits for fault are contemplated in a no-fault statute.[8] Certainly, this history does not manifest a

[8] In the absence of legislative history in 1924 supporting the fault-based interpretation of Section 1151, the Secretary offers to the Court four VA General Counsel opinions from 1922 to 1929 and suggests that "[o]ur review of materials from this period" indicates that Congress was concerned in 1924 only with medical cases where fault was involved. (Brief at 24). There is nothing in the Congressional materials to suggest this is true—or that fault cases were the only consideration of Congress. Moreover, in 59 VA Gen. Coun. Prec. Op. 458 (1929), upon which the Secre-

"clearly expressed legislative intent to the contrary" of the plain meaning of the statute that might warrant a different construction. *National Organization for Women v. Scheidler*, 114 S.Ct. at 806, quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Had the Secretary ever truly found any ambiguity in the statute enacted by Congress, the Secretary would have been obligated to resolve that ambiguity in favor of the veteran "under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 112 S.Ct. at 574 n.9; *see also Conroy v. Aniskoff*, 113 S.Ct. at 1565-66; *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Indeed, in a similar context, as we indicated above, the Secretary has recognized and appropriately applied this precept to the benefit of veterans. *See* VA Gen. Coun. Prec. Op. 80-90 (1990), citing *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). There being no record of the Secretary ever having considered this presumption with respect to Section 1151, his litigation position that the statute is ambiguous is entitled to little credence.

II. THE SECRETARY'S CONSTRUCTION OF SECTION 1151 IS NOT ENTITLED TO ANY DEFERENCE.

No deference is due to administrative interpretations at odds with the plain language of the statute itself. *Dole v. United Steelworkers of America*, 494 U.S. at 42-43; *Public Employees Retirement System of Ohio v. Betts*,

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tary relies for the premise of this argument, benefits were awarded to a veteran under Section 213 of the 1924 Act *without* consideration of fault. More significantly, in that opinion the General Counsel stated, "The prime place to go for evidence of the intention of Congress is the statute, which, in this case, is quite without ambiguity, as far as this Service can discern." *Id.* at 458.

494 U.S. 158, 171 (1989). Policy arguments and broad notions of congressional intent, *see Mertens v. Hewitt Associates*, 113 S.Ct. at 2071, also cannot overcome the text and structure of a statute "except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it." *Central Bank v. Interstate Bank*, 114 S.Ct. at 1142 (quoting *Demarest v. Manspeaker*, 498 U.S. at 191). Nor is an agency entitled to deference to a history of inconsistent or ambiguous interpretations of a statute. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. at 2597; *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16-17 (1932). *See also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *Southeastern Community College v. Davis*, 442 U.S. 377, 411-12 (1979); *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).

In seeking deference to the VA interpretation of the statute, the Secretary weakly asserts that "[t]he early history . . . strongly suggests that it was not implemented as a broad no-fault insurance provision." (Brief at 26). On the contrary, the early history demonstrates exactly the opposite because in the first two years of implementation of the 1924 Act, VA field officers granted benefits irrespective of whether there was proof of fault, obviously relying on the plain language of the statute. *See* Memorandum of the Solicitor, October 24, 1935 (Brief for the United States, Appendix B at 15a) [hereinafter Brief App. B]. During that period, there was no contrary definitive statement of VA policy, either by regulation or by General Counsel opinion. Therefore, the contemporaneous evidence surrounding the 1924 Act—both in the legislative record as we indicate above and in the conduct of the VA—convincingly demonstrates a paramount concern to compensate veterans injured by VA medical treatment, irrespective of fault.

According to the Secretary, the impetus for departure from the plain language of the statute came in 1924 from the Medical Division of the VA which "presumed" that benefits under the statute would "logically" be based upon some "fault or error on the part of the Bureau." (Brief at 27). As no action apparently was taken in response to this position by the Medical Division, the Medical Director wrote again to the VA Director on March 11, 1926, seeking to limit the award of Section 213 benefits to "the same ground that juries award their verdict in malpractice suits." [9] (Brief App. B at 16a). Yet even that extreme view was not adopted by the VA when, on June 11, 1926, the first restrictive regulation relative to this compensation scheme was promulgated. Instead, Regulation No. 137 merely precluded recovery for conditions arising out of the natural progress of the disease or injury being treated and acknowledged that recovery was available for additional injury resulting from treatment "improperly given." (Brief for the United States, Appendix A at 1a) [hereinafter Brief App. A]. As the Federal Circuit observed, this regulation did not preclude benefits in the absence of proof of fault.[10]

Only three months later, Regulation No. 157 was promulgated which authorized compensation for "malpractice, malfeasance, or misfeasance"—which are undefined —but still did not limit compensation to those circum-

[9] The memorandum of the Medical Director from this time period cannot be located, according to counsel for the Secretary. Therefore, our only knowledge of its contents is gleaned from the VA Solicitor's brief summary in his Memorandum of October 24, 1935. (Brief App. B).

[10] Denial of compensation for the natural progress of the disease or injury, reflected in 38 C.F.R. § 3.358(b)(2) (1990), is not at issue in this case. That provision provides a conclusive answer to the Secretary's argument that under respondent's position compensation would be required for the amputation of a gangerous limb. Furthermore, there is no "injury" where the intended outcome of the surgical procedure—to save the veteran's life—is accomplished.

stances. This regulation spawned a complaint from a service officer that the regulation was "more restrictive than the law upon which it was predicated." (Brief App. B at 18a). The result of this complaint was yet another formulation, Regulation No. 167, the purpose of which was to liberalize the previous standard by providing benefits for all injuries other than those which were "the usual after results of approved medical care and treatment properly administered." (Brief App. A at 5a). Thus, within a space of eight months, the VA redefined its position three times by regulation. Accordingly, the Federal Circuit was correct to observe the lack of precision in this process and language, and further observed that "it does not appear that [under any of these regulations] the VA actually excluded disability claims where the veteran could not prove fault or accident." (Pet. App. at 14a). Proof of fault was not an absolute prerequisite until August 1934, after reenactment. (Pet. App. at 16a).

The Secretary cites for evidence of this early fault-based standard two adjudicatory opinions of the VA from 1928 and 1930, as well as the same Comptroller General opinion referenced by the Court of Appeals. (Brief at 29-30). *See* 9 Comp. Gen. 515 (1930) (J.A. at 6). While the Secretary cites these VA adjudications to suggest that the actual practice of the VA during that time period was to employ a fault-based methodology, those findings actually deal only with the casuation issue. 65 Op. VA Gen. Coun. 429 (1930); 50 Op. VA Gen. Coun. 439 (1928).[11] They are entirely consistent with opinions of the Attorney General of the United States, upon which

[11] For example, the claim of Frank McKeown deals with a veteran whose fingers were severed when they were slammed in a door. The claim of William Concannon deals with emergency dental care. Neither turns on the issue of fault. There is no other evidence cited by the Secretary in support of his claim that the VA actually required proof of fault prior to August 1934. The use of the term "accident" in those opinions is, of course, consistent with a no-fault system.

the Federal Circuit relied. *See* 36 Op. Att'y Gen. 61, 63 (1929); 35 Op. Att'y Gen. 76 (1926). (Pet. App. at 14a). These opinions make clear, as do the VA General Counsel opinions of the same era relied upon by the Secretary, that the primary issue in VA benefits analysis was whether the injury was caused by the VA activity. This is entirely consistent with the plain meaning of the words "as a result of" contained in the statute.

Rather than exhibiting a record of consistent agency interpretation of the statute, the VA record demonstrates confusing inconsistencies influenced by concerns that have nothing to do with the original intent of Congress, as can be gleaned from a cursory reading of the Memorandum of the Solicitor to the Administrator, October 24, 1935, set out in Appendix B of the Secretary's Brief. That memorandum—itself arising out of a conflict in interpretation between the Chairman of the Board of Veterans Affairs and the Administrator of the VA—recounts 11 years of administrative confusion and *ad hoc* regulation and concludes with the following statement which hardly constitutes a clear administrative policy of statutory interpretation: "[C]onsiderable degree of liberality should be exercised in evaluating the facts. . . . [I]f the rule is liberally construed in individual cases . . . the cases which were intended to be encompassed in the Act will be taken care of." (Brief App. B at 29a). This record also reflects intentional departures from—or at least ignorance of—the two opinions of the Attorney General of the United States from that time period. Both of those opinions are predicated upon fundamental principles of worker's compensation law, which are entirely consistent with the no-fault predicate of the 1924 Act.[12]

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[12] The Comptroller General Opinion upon which the Secretary relies actually awarded benefits without evidence of fault to a veteran who had developed dermatitis as a result of hospital x-rays. 9 Comp. Gen. 515 (1930) (J.A. at 6).

The history of the so-called "long-standing" fault-based interpretation of Section 1151 is also set forth in General Counsel Precedent Opinions 2-78 (1978) and 99-90 (1990) (J.A. at 11 and 30), which also depict an agonizing maze of ineffective efforts to define what is meant by "accident" in order to ameliorate the restrictive fault-based gloss placed on the statute by the VA. These two opinions demonstrate that even after the Solicitor's Memorandum of October 24, 1935, numerous additional efforts were made by regulation and precedent opinion to articulate the meaning of "accident." Yet the word "accident" appears nowhere in the Act. All of these efforts can be traced to a single comment by General Hines in the 1924 hearings which ultimately had no bearing on the actual language of the 1924 Act:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, as the result of *accident* or negligence of treatment or unskillfulness—*things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof.

1924 Hearings at 113 (emphasis supplied).

While it is apparent that General Hines was using the word "accident" to denote a no-fault outcome in contrast to negligence—as COVA observed in its decision (Pet. App. at 28a)—the subsequent interpretations given the term "accident" by the VA attempt to identify a category of cases somewhere between no-fault and negligence. Regulations Nos. 137, 157, and 167 are themselves examples of failed attempts to define this notion. Yet, in Precedent Opinion 99-90, the General Counsel acknowledged that the reference to "accident" in the Comptroller General decision reported at 9 Comp. Gen. 515 (1930), was actually "gratuitous and largely irrelevant *obiter dictum.*" (J.A. at 38). The Comptroller General's fault-based interpretation nevertheless was carried over in Ad-

ministrator's Decision No. 255 (1934), which first concluded that benefits were payable *only* when the injury arose through accident, carelessness, or negligence. *Id.*

This view was altered yet again in July of 1953 when the VA Solicitor explained that benefits were payable only if injury was caused by "accidental means." (J.A. at 39). There is no explanation in Precedent Opinion 2-78 as to what this modification meant in the context of Section 1151 benefits. It appears to be another *ad hoc* attempt to define "accident" in an acceptable fault-based sense. The regulation was modified yet again in 1961, when the General Counsel concluded that the new 1961 regulation accepted the "ordinary meaning of the word 'accident' [as] opposite that of 'negligence.'" (J.A. 39-40). It is again not clear that the 1961 regulation, however, was meant to deny compensation in no-fault circumstances: that is, "opposite that of negligence."

In the 1978 amendment to the regulation, generated by the General Counsel's expressed dissatisfaction with the 1961 interpretation, the concept of "accident" as opposite "negligence" was translated into a new definition of "accident" as "any unforeseen, untoward result." (J.A. at 40); 43 Fed. Reg. 51,015 (1978). In 1990, the General Counsel concluded that even that definition was too restrictive to "allow grants of benefits in certain cases we believe fall reasonably within the realm contemplated by Congress when creating this benefit." VA Gen. Coun. Prec. Op. 99-90 (1990) (J.A. at 40).[13]

[13] It is interesting to note that in suport of a recent failed legislative amendment to Section 1151 which re-defines "accident" to prevent "unfair" results in adjudicating Section 1151 benefit claims, the Secretary opined that the decision in this case would cost $5 billion in the next five years. 138 Cong. Rec. S4040 (March 20, 1992). When the Secretary filed his petition to this Court that figure shrunk to $1 billion. (Pet. at 19). However, no mention is now made whatsoever in the Secretary's main brief about this potential financial impact. That is because the medical information upon which those figures were premised does not support that inference. *See* Brief for *Amicus Curiae* Paralyzed Veterans of America *et al.*, at 18-22. Furthermore, the VA General Counsel has recently concluded that the decision in this case—should it be upheld—would not be retroactive. *See* VA Gen. Coun. Prec. Op. 9-94 (1994). One of the asserted predicates for the grant of *certiorari* in this case, therefore, has been abandoned by the VA.

Therefore, rather than demonstrating a long-standing agency interpretation of a statute, VA history reveals no less than eleven different definitions or interpretations of the word "accident" even though that word appears nowhere in the statute. Furthermore, the VA does not currently believe that the regulation as it exists today accurately reflects Congressional intent. The problem is aptly summarized by the General Counsel in the 1978 Precedent Opinion: "Some of the difficulty seems to have resulted from the fact that administrative officials have not construed the language of the statute literally in determining whether benefits were payable. . . ." VA Gen. Coun. Prec. Op. 2-78 at 3 (1978) (J.A. at 19).

Thus history clearly shows not only that the VA has been inconsistent in promulgating the regulation at issue, but also that it has been well aware of its inconsistencies. In March of 1984, the General Counsel observed:

> Over the years, Congress has amended section 351 [current section 1151] and its predecessors but has not sought to challenge VA's interpretation by amendment or otherwise. It may, therefore, be urged that Congress has impliedly approved the requirement of VA error or fault in the current regulation. Although we would not rule out resort to this rule of statutory construction in a proper case, *we do not consider it applicable here because we doubt a court would agree. Kirkhuff v. Nimmo*, 683 F.2d 544 (D.C. Cir. 1982), is an excellent guide to obtaining judicial deference to our interpretations.
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> * * * *

> We do not believe a court would accord a similar deference to the interpretation in question here. In *Kirkhuff*, the statutes . . . were arguably inconsistent, necessitating resort to rules of statutory construction. *That is not the case here where the interpretation is a gloss on a statute that on its face does not require VA fault.* Also, in *Kirkhuff*, there was an unambiguous history of administrative consistency, which cannot be said of the VA decisions involving section 351 and its predecessors. *We believe a court would, in the absence of affirmative congressional consent, be extremely reluctant to defer to VA's foreclosure of liability in this case.*

Digested Op. VA Gen. Coun. 212B (1984) (Reply Brief for the Petitioner, Appendix at 4a) (emphasis supplied).

III. REENACTMENT AND AMENDMENT OF THE ACT DO NOT JUSTIFY THE VA'S FAULT-BASED REGULATION.

Since the contemporaneous evidence surrounding the passage of the Act in 1924 supports the no-fault reading of Section 1151, the Secretary is left with the argument that the 1934 reenactment implicitly adopted a fault-based analysis, assertedly because that fault-based interpretation was "well-established" at that time. (Brief at 31). As we indicate above, nothing was well-established in 1934, other than a vacillating VA position. The Secretary's regulation cannot be saved in this case by employing the fiction that Congress is presumed to know of, and thereby to have adopted, an agency's interpretation when it re-enacts a statutory provision without change.[14]

When a regulation conflicts with the statute, the fact of subsequent reenactment of the statute is immaterial,

[14] The Court has refused to apply this presumption where there has been both a consistent agency interpretation *and* judicial decisions in eleven circuits supporting that interpretation where the interpretation was contrary to the plain language of the statute. *Central Bank*, 114 S.Ct. at 1453-55.

for Congress could not add to or expand the statute by impliedly approving the regulation. *See Leary v. United States*, 395 U.S. 6, 24-25 (1969), citing *Commissioner v. Acker*, 361 U.S. 87, 93 (1959). This Court has also noted that it is not realistic to infer approval of an administrative interpretation from Congressional silence. *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1978). Reenactment is not proof of approval where there is no evidence that Congress gave any particular consideration to the Secretary's regulation during reenactment of the statute. *See Rowan Cos. v. United States*, 452 U.S. 247, 262 (1981); *United States v. Calamaro*, 354 U.S. 351, 359 (1957). As this Court has often noted, it is at best treacherous to find in Congressional silence the adoption of a controlling rule of law. *See Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). In short, the predicate conditions for applying the reenactment doctrine simply do not exist in this case. *Fogerty v. Fantasy, Inc.*, 114 S.Ct. at 1032-33.

A. Post 1924 Congressional Action

The Secretary is unable to make a plausible argument that the fault-based interpretation was known to and ratified by Congress in 1934. The regulation in place at the time was the 1927 Regulation No. 167, reissued as VA Regulations & Procedure §§ R-1120 through R-1122 (1930). (Brief App. A at 6a-10a). As the Secretary acknowledges, that regulation employed "the most liberal verbal standard" of the early regulations. On its face, however, Regulation No. 167 only precludes compensation for the "usual after results of approved medical care and treatment properly administered." That language and the VA's admonition that it should be liberally construed do not support the Secretary's contention that Congress was aware in 1934 of a "well-established fault-or-accident requirement." (Brief at 35). The recitation by the Secretary of reports to Congress that were not part of the legislative consideration of the 1934 Act are irrelevant.

In short, there is no evidence that Congress was aware in 1934 of the contention of the Secretary today. *See Thompson v. Clifford,* 408 F.2d 154, 162 (D.C. Cir. 1968). Moreover, none of the Secretary's regulations or General Counsel opinions were generally available to Congress in 1934 since the Federal Register Act was not passed until 1935 and since General Counsel opinions were not published by the VA until 1989. *See* Federal Register Act of 1935, 49 Stat. 500 (1982) (codified at 44 U.S.C. §§ 1501-1511).

The only support for this reenactment argument the Secretary musters are isolated and cryptic comments by a single senator in 1934. (Brief at 34). Once again, however, the Federal Circuit found that the senator's discussion "expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act." (Pet. App. at 15a). The remarks of a single senator do not carry the intent of Congress. *See, e.g., Pennhurst State School v. Halderman,* 451 U.S. 1, 20 (1981); *Chrysler v. Brown,* 441 U.S. 281, 311 (1979). The evidence of the existence of a fault-based agency interpretation at reenactment in 1934 is no stronger than that surrounding the original enactment in 1924. Therefore, the Court of Appeals was correct not to attribute any significance to the reenactment of the statute insofar as it relates to the validity of the Secretary's regulation today. Indeed, this is the same conclusion that the VA General Counsel reached in his most recent discussion of the history of Section 1151. "[T]he legislative history surrounding reenactment of this provision must be considered somewhat ambiguous." VA Gen. Coun. Prec. Op. 99-90 (1990) (J.A. at 36).

Congressional silence as the statute was amended four times since 1934 similarly does not justify disregarding the clear language of the statute. Despite some inconsistency in this Court's decisions regarding this so-called "acquiescence doctrine," the Court most recently has concluded that "as a general matter . . . we have stated that these arguments deserve little weight in the interpretive process." *Central Bank of Denver,* 114 S.Ct. at 1453. First, these amendments had nothing to do with the fault concept. Second, the 1962 amendment actually supports the plain meaning given the statute by the courts below. In that year, Congress removed the two-year period of limitations for Section 1151 claims and required an offset for amounts recovered by a veteran under the Federal Tort Claims Act, which is a fault-based statute. Act of Oct. 15, 1962, Pub. L. No. 87-825 § 1 (enacting 38 U.S.C. § 3010(c)), § 3, 76 Stat. 948, 950. That change makes clear that Section 1151 benefits and a veteran's rights under the FTCA are compatible but not identical. It is not logical to conclude that where Congress carefully prescribed the terms under which it would waive the sovereign immunity of the United States under the FTCA, it previously intended to impose similar limitations on Section 1151 benefits by its silence.

The contrary view makes no sense in light of the practical effect of the Secretary's position. 38 U.S.C. § 7316 (Supp. IV 1992) now provides that the *exclusive* remedy for malpractice actions against the VA is the Federal Tort Claims Act. An award to a veteran under Section 1151 that is predictated on a finding of "carelessness, negligence, lack of proper skill, or error in judgment" under the current regulation would be given collateral estoppel effect in a civil action by the veteran under the FTCA. *See United States v. Utah Construction Co.,* 384 U.S. 394 (1966). Given that federal waiver of sovereign immunity is to be narrowly construed, *see United States v. Nordic Village, Inc.,* 503 U.S. ——, 112 S.Ct. 1011 (1992), it is unlikely that Congress ever could have intended this result.

B. The Relationship Between Section 1151 and the FTCA

The creation of the offset provision by Congress makes clear that Section 1151 payments, unlike FTCA damages, were not intended to be tied to fault. Before 1946, the government could not be sued, even for damages that were clearly its fault. Relief, if any, for injustices was available only in the form of "private bills." With the enactment of the FTCA, for the first time in our history the federal government's liability for the negligence of its employees was no longer the exception but rather the rule.

When the FTCA was enacted, there were no explicit exclusions of any kind for tort suits by members of the armed forces or by veterans injured at VA facilities. Although many of the proposed bills sought to exclude servicemen and veterans from recovering under the Act, by the time of its passage "the last vestige of the exclusion for members of the armed forces disappeared." *Brooks v. United States*, 337 U.S. 49, 51-52 (1949). In *Brooks*, this Court concluded that "it would be absurd to believe that Congress did not have the servicemen in mind . . . when this statute was passed." *Id.* at 51. Thus, the Court refused to "pronounce a doctrine of election of remedies [for servicemen], when Congress has not done so." *Id.* at 53.[15] Thus, it seems clear that in the case of Section 1151 and the FTCA, Congress had purposefully allowed the two systems to coexist. *See also* Administrator's Decision No. 953 at 931 (1955).

After passage of the FTCA, courts recognized Congress' choice and permitted veterans to collect both VA benefits and damages under the FTCA. *See, e.g., United States v. Brown*, 348 U.S. 110, 113 (1954). Responding to the logic of *Brown*, the Veterans' Administrator

[15] However, later that year, in *Feres v. United States*, 340 U.S. 135 (1949), the Court found an implied exemption for servicemen injured while on active duty.

proposed coordinating legislation, which Congress enacted in 1962. *See Morgan v. United States*, 968 F.2d 200, 207 (2d Cir. 1992). That is the legislation now contained in the final sentence of Section 1151, providing as follows:

> Where an individual is . . . awarded a judgment against the United States in a civil action brought pursuant to [the FTCA] . . . then no [veterans'] benefits shall be paid to such individual for any month beginning after the date such judgment . . . becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment . . . .

38 U.S.C. § 1151.[16]

As a result, since 1962 veterans who obtain FTCA settlements or judgments prospectively lose their benefits under Section 1151 (but not other portions of Title 38) until benefits equal to the tort recovery have been foregone. In accordance with VA regulations, the offset applies "when the disability or death is considered service-connected solely by virtue of the provisions of 38 U.S.C. § 351 [now § 1151]. If the disability or death is rated service-connected under other sections of Title 38, then compensation . . . is not subject to offset . . . ." V.A. Adjudication Procedure Manual at M21-1, par. 29.53

[16] The Senate Report stated that the purpose of the bill was to preclude "duplicate recoveries from the United States for the same disability or death under section 351 [now Section 1151] and the Federal Tort Claims Act . . . ." S. Rep. No. 2042, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3260. The House Report on the proposed setoff provision described it as similar to a "provision [that] exists today that precludes payment of disability compensation to a veteran who has been awarded disability severance pay until the amount of compensation the veteran would have been entitled to equals the amount of such severance pay." H.R. Rep. No. 2123, 87th Cong., 2d Sess. 10 (1962). The new setoff provision was both non-controversial and part of a larger bill; there is no further legislative history bearing on the issues before this Court.

(b), *quoted in Cole v. United States*, 861 F.2d 1261, 1264 (11th Cir. 1988).

To understand why the creation of the offset provision in Section 1151 supports the claim that Section 1151 does not have a fault requirement, it is useful to contrast it with the operation of the FTCA—the quintessential fault-based system. In *Morgan v. United States*, 968 F.2d at 200, the Second Circuit described the ways in which the VA benefits system diverges from a tort model. The court noted that: (1) "many disability ratings are keyed to specific anatomical losses, . . . which may or may not result in a diminution of earning ability," *id.* at 205; (2) some veterans are rated as *more than totally disabled*, *id.* at 205-06; and (3) "disability ratings are '*assigned*' to individual veterans 'on the basis of the nature and extent of the disability or combination of disabilities, *without regard to whether the particular veteran is or is not actually engaged in gainful occupation or the level of his or her earnings*[.]' " *Id.* at 206, quoting S. Rep. No. 604, 98th Cong., 2d Sess. 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4479, 4495 (emphasis supplied by Judge Kearse).

A system that would, for the sake of efficiency, eliminate questions of proof at the "damages" stage (questions that could be answered with such documentary evidence as tax returns and pay stubs) would surely avoid the far more difficult questions of proof that arise at the fault stage where medical malpractice cases almost always require the testimony of experts. Congress has purposefully allowed veterans to avail themselves of two recovery systems—veterans benefits and the FTCA—only one of which is designed to provide damages for fault. In its coordination of the systems, it chose not an election of remedies (which would have been proper if the systems were functional equivalents), but an offset provision that comes into play only when the recoveries overlap.

The purposes of the FTCA and Section 1151 stand in sharp contrast: the former was the culmination of a long effort to permit adjudication of government *fault*, while the latter reflects the government's goal of allocating payments to those injured while under the care of the VA. Accordingly, the FTCA includes procedures intrinsic to any fault-based system, while Section 1151 does not. It would have been irrational for Congress to create two systems to decide fault in the same cases. Moreover, the inclusion in Section 1151 of an offset provision, as opposed to an exclusivity clause *or* an election of remedies provision, both of which Congress knew how to write, reflects the reality that Section 1151 and the FTCA are not equivalent systems. Finally, the *design* of that offset provision reveals that FTCA damages include amounts above and beyond what Section 1151 benefits were meant to cover—namely, the additional recovery that, under our tort system, results from proof of fault.

IV. REGULATIONS OF THE VA SHOULD BE SUBJECT TO VIGOROUS REVIEW AND ARE NOT ENTITLED TO *CHEVRON* DEFERENCE.

As the Federal Circuit recognized, Section 1151 benefits constitute a potential "statutory right" conferred by Congress. (Pet. App. at 21a). The Secretary may not regulate away those rights by using his limited authority under 38 U.S.C. § 501 (Supp. IV 1992). Under Section 501(a), the Secretary is empowered only to enact regulations "necessary and appropriate to carry out the laws administered" and which are "consistent with those laws." That authority pertains strictly to procedural matters and does not include the right to enact substantive regulations affecting individual rights in a manner which is at odds with the administrative structure Congress has enacted. *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988). This Court has previously reviewed the Secretary's authority under this statute and invalidated a regulation which constituted impermissible legislation

by the VA. *Miller v. United States*, 294 U.S. 435, 439-440 (1935). Applying the same restrictive standard, this Court upheld another VA regulation in *United States v. Zazove*, 334 U.S. 602 (1947), while maintaining that the Act must be liberally construed in favor of veterans. *Id.* at 610-611.

There is no reason to require a less restrictive review of such regulations than that enunciated by the Federal Circuit. The very reason for the creation of the Court of Veterans Appeals was the history of ineffective and unfair VA adjudication of veterans' benefits. In 1988 Congress, after many hearings and much debate, concluded that the VA was not adequately responding to the needs of veterans. *See generally* Hagel & Horan, *Five Years Under the Veterans' Judicial Review Act: The VA is Brought Kicking and Screaming Into the World of Meaningful Due Process*, 46 Me. L. Rev. 43 (1994). Congress passed legislation that fundamentally changed the nature of the VA. The legislation included the Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988) codified at 38 U.S.C. § 301 (Supp. IV 1992),[17] and the Veterans' Judicial Review Act [VJRA].[18] As Senator Cranston stated in support of creation of the Court of Veterans Appeals under the VJRA:

> [A]nother basic reason for judicial review legislation is the need to establish a basis for review of questionable agency actions restricting, withholding, or withdrawing VA benefits. . . . There is also the potential for unduly restrictive legal opinions from the

[17] Congress gave the VA Cabinet level status in this Act, in part, to help it compete for resources and to control poor claims development and weaknesses in complex cases. S. Rep. No. 342, 100th Cong., 2d Sess. 30-31 (1988). The Senate Report also cites a lack of uniformity in VA decision making at the regional level. *Id.* at 35.

[18] *See generally* Brief for *Amicus Curiae* Paralyzed Veterans of America, *et al.* at 13-16.

> Office of the General Counsel which may operate to deny veterans access to benefits to which they are entitled under the law.
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> I am suggesting that outside review by an independent entity to determine whether governmental action is legal and whether it is fundamentally fair would benefit all parties involved. The VA would have its processes subjected to appropriate scrutiny and, to the extent the agency's actions were upheld, would be vindicated. Likewise, to the extent the agency's actions were held unlawful or fundamentally unfair, steps could be taken to improve the process so as to ensure that the agency is fulfilling its mission to serve veterans in the best possible fashion.

134 Cong. Rec. 31465 (October 18, 1988) (statement of Sen. Cranston).

Three elements of the VJRA are particularly relevant to the issue of whether VA regulations are entitled to any deference: (1) the provision for judicial review of BVA decisions; (2) the requirement that the VA comply with the rulemaking procedures of the Administrative Procedure Act; and (3) the requirement that the VA publish General Counsel Precedent Opinions in the Federal Register. Prior to the VJRA, no decision of the VA in adjudicating a veteran's claim was reviewable by any court. 38 U.S.C. § 211(a) (1982). At the same time, however, the regional offices and the BVA were bound to follow the regulations and the General Counsel opinions of the VA in adjudicating such claims. 38 U.S.C. § 4004(c) (1958) (codified as amended at 38 U.S.C. § 7104 (Supp. IV 1992)). Therefore, prior to 1988 not only was there no judicial scrutiny of VA regulations, there existed no mechanism even within the VA whereby an affected veteran could challenge the lawfulness of a VA regulation. Now COVA has the express authority, pursuant to 38 U.S.C. § 7261(a)(3)(C) (Supp.

IV 1992), to "hold unlawful . . . regulations issued or adopted by the Administrator . . . found to be in excess of statutory . . . authority . . . or in violation of statutory right." In this regard, it is important to note that Congress rejected a request by the VA General Counsel to require the new court to afford *conclusive weight* to VA regulations. *See Judicial Review Legislation: Hearing Before the Senate Comm. on Veterans' Affairs on S. 11, the Proposed Veterans Administration Adjudication Procedure and Judicial Review Act, and S. 2292, Veterans' Judicial Review Act*, S. Hrg. 100th Cong., 2d Sess. 508 (1988) (statement of Donald L. Ivers, VA General Counsel).

The second significant congressional change pertains to application of the APA to VA rulemaking. Regulations of the VA were never published for notice and comment in the Federal Register prior to 1972. The VA had exempted itself from the notice and comment requirements of the Administrative Procedure Act under the exception contained in 5 U.S.C. § 553(a)(2) (1982) for matters related to "benefits." S. Rep. No. 100-418, 101st Cong., 2d Sess. 48 (1988). In 1972, however, the VA voluntarily adopted 38 C.F.R. §1.12 (1973), which obligated the VA to follow the provisions of the APA for notice and comment on proposed regulations. Hence, the only time that any version of the regulation at issue in this case was ever published in the Federal Register for notice and comment occurred in 1978 when the VA's so-called liberalizing regulation was proposed. 43 Fed. Reg. 34,505 (1978).[19]

[19] That publication—the only publicly noticed regulation of the VA on this issue until after Mr. Gardner filed his claim—expressly stated, contrary to the Secretary's position that Congress intended a fault-based system, that the proposed amendment to 38 C.F.R. § 3.358(c)(3) would provide benefits for an "accident without regard to whether the accident resulted from negligence on the part of the Veterans Administration." 43 Fed. Reg. 34,505 (1978). This proposed change was said to derive from "careful study of

The legislative history of the VJRA shows that the VA voluntarily committed itself to comply with the APA only after being pressured by the Administrative Conference of the United States. H.R. Rep. No. 5288, 100th Cong., 2d Sess. 27-28 (1988). With the passage of the VJRA, however, Congress not only required the VA to engage in notice and comment rulemaking, but also prohibited the VA from relying on the APA Section 553(a)(2) exception to the notice and comment requirement, as the VA had prior to 1972. 38 U.S.C. § 501(d) (Supp. IV 1992). It is clear that Congress in 1988 was dissatisfied with VA regulatory practice. Therefore, no deference is due to VA regulations that predate that time since those regulations are not the product of public exchange with VA rulemakers. This fundamental principle which underlies judicial deference to agency regulations is totally absent in the regulations involved in this appeal.

The third significant change in the VJRA pertains to the proliferation of General Counsel opinions. Congress in 1988 was concerned with the VA practice of interpreting its regulations through periodic General Counsel opinions without making these interpretations available to the public through publication in the Federal Register. *See* 134 Cong. Rec. S31,772 (1988). Although the Federal Register Act of 1935 required publication of all documents of substantive legal effect, the VA never published its General Counsel opinions in any publication available to the public. It was not until 1989, when the VA adopted 38 C.F.R. § 14.507 (1990), pertaining specifically to General Counsel opinions, that the VA began publishing General Counsel opinions. However, under

the legislative history of 38 U.S.C. § 351." *Id.* The VA, however, has never published for notice and comment its regulatory requirement that there must be a showing of some form of fault on the part of the VA before benefits may be awarded to those injured as a result of medical procedures.

the rubric of that regulation, only a General Counsel opinion designated by the General Counsel as a "precedent opinion" shall be published in the Federal Register in accordance with 5 U.S.C. § 552(a)(1) (1982). Undesignated opinions are deemed by the Secretary to be exempt from notice and rulemaking under 5 U.S.C. § 552(a)(2) (1982), despite Congress' mandate in 38 U.S.C. § 501(d) that the VA may never utilize that exception to notice and comment rulemaking. *See* 54 Fed. Reg. 5610-5612 (Feb. 6, 1989).[20]

Hence, the General Counsel opinions upon which the Secretary relies clearly lack fundamental elements of fairness which are the predicate to judicial deference to agency interpretations. Indeed, none of the General Counsel opinions cited by the Secretary surrounding the enactment of the statute in 1924 and the reenactment in 1934 have since been designated as precedent opinions and, hence, would not be binding on the VA today under 38 C.F.R. § 14.507 (1990). It is also noteworthy that the adjudicatory General Counsel opinions rendered during this early time period were not available at all to the public because of the confidentiality statute contained in the Act. *See* Pub. L. No. 68-242, ch. 320, title I, § 30, 43 Stat. 607, 615 (1924), codified at 38 U.S.C. § 3301 (1982).

These circumstances reflect an agency in "splendid isolation" from all the concomitants of public and judicial review which are predicates to judicial deference to its decisions. In the absence of these predicates, the Secretary's assurance that Congress has provided vigilant oversight to VA regulations is inadequate. (Brief at 40).

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[20] The VA continues to avoid the notice and comment requirement by relying in large measure on manuals of procedure, even though the VA enjoys no exemption at all from notice and comment rulemaking for such standards. *See Fugere v. Derwinski*, 1 Vet. App. 103 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992).

Indeed, Congress itself has confessed its own inability to oversee the VA system.

> Although the Committees on Veterans' Affairs in both Houses carry out significant oversight of the activities of the VA, the limited resources of the Committees do not allow for thorough review and congressional action to resolve satisfactorily all of the legal and policy issues arising in such a large and complex agency.

134 Cong. Rec. S16,643 (1988) (statement of Sen. Cranston).

In this state of isolation, the VA has promulgated regulations which are substantive in nature. The VA rule at issue here, in all its incarnations, was and is substantive because it "affect[s] individual rights and obligations." *Morton v. Ruiz*, 415 U.S. at 232. A substantive rule, however, cannot be given the force and effect of law if it is not the product of "certain procedural requisites," among them the notice and comment requirements of the APA. *Chrysler v. Brown*, 441 U.S. at 301; *see also Lincoln v. Vigil*, 508 U.S. ——, 113 S.Ct. 2024, 2033-35 (1993). Additionally, an agency's authority for promulgation of a substantive rule "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler*, 441 U.S. at 302.

The regulations of the VA at issue meet neither requirement. As we have indicated above, not only were these regulations not the product of notice and comment under the APA, but also they constituted a secret body of law known only within the agency and among some practitioners. With respect to congressional authorization for this regulation, the only source of that power is 38 U.S.C. § 501 which permits the Secretary only to prescribe regulations "necessary or appropriate to carry out the laws . . . and consistent with those laws." This

is the same Congressional language found by this Court not to justify enactment of a substantive regulation in *Chrysler v. Brown*, 441 U.S. at 304. Nothing in Section 501 would even remotely authorize the promulgation of the VA substantive regulations or interpretations pertinent to the issue in this case. The Court of Veterans Appeals has concluded that similar regulations, promulgated after enactment of the VJRA without notice and comment, are invalid in VA proceedings. *Fugere v. Derwinski*, 1 Vet. App. at 103.

Vigorous review of regulations is also shown to be justified by the jurisprudence of the Court of Veterans Appeals in the six years of its life. COVA has repeatedly criticized the VA for its misinterpretation of Congressional statutes and for its intransigence and reluctance to conform its practices to the realities of judicial review. For example, in *Jones v. Derwinski*, 1 Vet. App. 596 (1990), COVA enjoined the VA from directly contacting represented veterans and from providing to veterans outdated and erroneous information. The Secretary was also sanctioned for not promptly correcting an inaccurate representation made to the court upon discovery of that inaccuracy. In *Fugere v. Derwinski*, 1 Vet. App. at 103, COVA held that the VA could not rescind a directive from its adjudication manual without public notice and comment. In *Tobler v. Derwinski*, 2 Vet. App. 8 (1991), COVA was obligated to direct the VA to apply the decisions of the court as precedent in adjudicating claims at the regional offices and before the BVA. In *Hines v. Derwinski*, 2 Vet. App. 30 (1991), COVA issued a show cause order as to why costs should not be granted against the VA for failing to respond to a veteran's record request for over six years. In *Adamski v. Derwinski*, 2 Vet. App. 46 (1991), COVA sanctioned the VA for dilatory tactics in failing to file the record on appeal when ordered. In *Moore v. Derwinski*, 2 Vet. App. 67 (1992), COVA ordered the Secretary to show cause why he should not be

subject to contempt for failing to pay benefits as ordered by the court. In *King v. Brown*, 4 Vet. App. 519 (1993), COVA criticized the VA failure to provide an accurate and relevant record and basis for decisions on appeal.

In the Report for Fiscal Year 1993, the Chairman of the Board of Veterans Appeals estimated that the time necessary for the BVA to decide a single appeal beginning in fiscal year 1995 will be 945 days, an increase from the 139 days needed in 1991, even though the number of decisions in 1995 is projected to be one-third fewer than 1991. Report of the Chairman of the Board of Veterans Appeals for Fiscal Year 1993 at 44, 49. This delay is attributed by the Chairman to the "increased formality and complexity of the adjudication process" caused by judicial review. *Id.* at 24. In remarks to Congress, the Chairman stated as follows:

> I will not mince words, Mr. Chairman. We are where we are because of the Veterans' Judicial Review Act. That landmark legislation, which created the Court of Veterans Appeals, has increased the time a claimant must wait for a final decision. There is no doubt that the Court is an adversarial system grafted on to one which was designed to function in a nonadversarial manner. The result is that the mere availability of judicial review has made the administrative adjudication process more formalistic, rigid, complex, and inherently more time-consuming.

Hearings Before the Subcomm. on Compensation, Pension, and Insurance, House Comm. on Veterans' Affairs, 103d Cong., 2d Sess. 1 (1994) (statement of the Hon. Charles L. Cragin, Chairman, Board of Veterans Appeals). Statements like these make it clear that the VA wishes to return to the days before judicial review. As the Federal Circuit noted, however, Congress' lengthy deliberation over the Veterans' Judicial Review Act, and its carefully crafted scheme for judicial review of VA regulations, counsels for "vigorous review."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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